Supreme Court, U.S.
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No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

vs.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 17, 1994
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RELEVANT DOCKET ENTRIES

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1:90cv1413 Adarand Constructors v. Skinner, et al

8/10/90	1	COMPLAINT and Jury Demand (Summonses issued) (tp)
10/9/90	8	ANSWER by defendant Samuel K. Skinner, defendant Robert E. Farris, defendant Louis N. MacDonald, defendant Jerry Budwig (lm) [Entry date 10/11/90]
4/24/91	18	Motion by defendant for summary judgment before Judge Jim R. Carrigan (lm)
4/24/91	19	BRIEF by dfts Samuel K. Skinner, Robert E. Farris, Louis N. MacDonald, Jerry Budwig in support of motion for summary judgment before Judge Jim R. Carrigan [18-1] (lm)
4/24/91	21	STATEMENT of Facts by plaintiff Adarand Constructors (lm) [Entry date 04/25/91]
4/24/91	22	Motion by plaintiff Adarand Constructors for summary judgment before Judge Jim R. Carrigan (lm) [Entry date 04/25/91]
4/24/91	23	MEMORANDUM of points and authorities by plaintiff Adarand Constructors in support of motion for summary judgment before Judge Jim R. Carrigan [22-1] (lm) [Entry date 04/25/91]

4/24/91	24	EXHIBITS to pla's mtn for s/j (lm) [Entry date 04/25/91]
5/6/91	29	SUPPLEMENTAL by plaintiff Adarand Constructors exhibits in support of mtn for s/j [24-1] (lm) [Entry date 05/07/91]
5/13/91	32	BRIEF Amicus Curiae by movant Rocky Mt Enterprise, movant Commercial Energies in support of dfts' motion for summary judgment and in opp to pla's mtn for summary judgment before Judge Jim R. Carrigan [18-1] (lm) [Entry date 05/14/91]
5/15/91	33	MOTION by Rocky Mt Enterprise, Commercial Energies for leave to substitute attached Amicus Curiae Brief for draft brief filed on 5/13/91 (lm) [Entry date 05/16/91] [Edit date 05/16/91]
5/24/91	34	MEMORANDUM by plaintiff Adarand Constructors in opposition to motion for summary judgment before Judge Jim R. Carrigan [18-1] (lm) [Entry date 05/28/91]
5/24/91	35	Supplement EXHIBITS in support of pla's memorandum in opp to dfts' mtn for summary judgment (lm) [Entry date 05/28/91]
5/24/91	36	MEMORANDUM by defendants in opposition to pla's motion for summary judgment before Judge Jim R. Carrigan and in further support of dfts' mtn for summary judgment [22-1] (lm) [Entry date 05/28/91]

5/29/91	37	Supplemental EXHIBITS in support of their mtn for summary judgment in opp to pla's mtn for summary judgment (lm) [Entry date 05/30/91]
9/16/91	38	NOTICE of Significant Authority by Federal defendants (lm)
11/26/91	41	Amicus Curiae BRIEF FILED by movant Rocky Mt Enterprise in support of dfts' mtn for s/j and in opp to pla's mtn for s/j regarding [33-1], regarding [32-1], regarding [18-1] (lm) [Entry date 12/02/91]
4/21/92	42	MEMORANDUM, OPINION, AND ORDER: by Judge Jim R. Carrigan granting dfts' motion for summary judgment [18-1]; denying pla's motion for summary judgment [22-1]; dismissing pla's claims and action with prejudice (cc: all counsel); entry date: 4/22/92 (lm) [Entry date 04/22/92]
7/17/92	44	MOTION by plaintiff Adarand Constructors to extend time (14 days from order entered upon this mtn) file notice of appeal (lm) [Entry date 07/20/92]
7/17/92	45	DECLARATION by Todd S. Welch in support of pla's motion to extend time to file notice of appeal [44-1] (lm) [Entry date 07/20/92]
7/20/92	46	Amended MOTION by plaintiff Adarand Constructors for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal (lm)

7/20/92	47	DECLARATION by Todd S. Welch in support of plaintiff's Adarand Constructors motion for ext of time to file notice of appeal [46-1] (lm)
7/23/92	49	RESPONSE by defendant to motion for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal [46-1] (lf) [Entry date 07/24/92]
8/3/92	50	MINUTE ORDER: by Judge Jim R. Carrigan granting motion for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal [46-1]. Hearing is vacated. (cc: all counsel); entry date: 8/5/92 (gc) [Entry date 08/05/92]
8/5/92	51	NOTICE OF APPEAL by plaintiff Adarand Constructors in re memorandum opinion and order [42-2] of 4/21/92; Notice of transcript order form due 8/15/92; Notice mailed to all counsel on 8/5/92 (gc)

GENERAL DOCKET FOR
Tenth Circuit Court of Appeals

8/7/92	1	[612241] Civil case docketed. Preliminary record filed. Transcript order form due 8/17/92 for Deborah A. Stafford pursuant to R.42.1. Docketing statement due 8/17/92 for Adarand Constructors. Notice of appearance due 8/17/92 for Louis N. MacDonald, for Jerry Budwig, for Robert E. Farris, for Samuel K. Skinner, for Adarand Constructors. (mbm)
8/17/92	2	[614115] Docketing statement filed by Adarand Constructors. Original and 4 copies. c/s: y. (mbm)
8/17/92	3	[614166] Notice received from Appellant Adarand Constructors that a transcript is not necessary for this appeal. Notice due that record is complete 8/24/92 for Jim R. Carrigan. (mbm)
11/30/92	11	[637558] Appellant's brief filed by Adarand Constructors. Original and 7 copies. c/s: y. Served on 11/30/92 Oral argument? y., Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 1/4/93 for Louis N. MacDonald, for Jerry Budwig, for Robert E. Farris, for Samuel K. Skinner (jtp)

2/4/93	14	[653355] Appellee's brief filed by Samuel K. Skinner, Robert E. Farris, Jerry Budwig, Louis N. MacDonald. Original and 7 copies. c/s: y. Served on 2/3/93. Oral Argument? y. Appendix filed. Original and 1 appendix copy. Appellant's optional reply brief due 2/22/93 for Adarand Constructors. (pdw)
2/17/93	17	[655716] Appellant's reply brief filed by Adarand Constructors. Original and 7 copies. c/s: y. (pdw)
9/29/93	25	[712317] Case argued and submitted to Judges McKay, Holloway, Garth. (sls)
2/16/94	26	[743222] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published, McKay; Holloway; Garth, authoring judge. [92-1242] (mbm)
5/23/94	29	[768362] Petition for writ of certiorari filed on 5/17/94 by Appellant Adarand Constructors. Supreme Court Number 93-1841. (afw)
10/3/94	31	[799259] Supreme Court order dated 9/26/94 granting certiorari filed. (afw)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-1413

ADARAND CONSTRUCTORS, INC.
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration, and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its complaint against Defendants, alleges as follows:

PARTIES

1. Plaintiff is a Colorado Corporation, incorporated under the laws of the State of Colorado, with its principle

place of business in Colorado Springs, Colorado, and is a citizen of the State of Colorado.

2. Defendant Samuel K. Skinner is the Secretary of the United States Department of Transportation ("the Secretary"). Under the Surface Transportation Assistance Act of 1982 ("STAA") and the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), the Secretary is charged with the administration of those statutes and other Federal statutes though [sic] the promulgation and enforcement of regulations.

3. Defendant Robert E. Farris is the Administrator of the Federal Highway Administration ("FHA"). Defendant Farris is responsible for the administration and enforcement of STAA and STURAA, subject to the supervision of Defendant Skinner.

4. Defendant Louis N. MacDonald is the Regional Administrator of the FHA for Region VIII, whose territory and jurisdiction include the State of Colorado. Defendant MacDonald is responsible for the administration and enforcement of STAA and STURAA by the FHA in the State of Colorado, subject to the supervision of Defendants Skinner and Farris.

5. Defendant Jerry Budwig is the Division Engineer of the Central Federal Lands Highway Division of the FHA, Department of Transportation and is charged with the administration and supervision of all contracts let by any federal agency on federal lands within the states which comprise the Central Federal Lands Highway Division including the State of Colorado, subject to the supervision of Defendants Skinner, Farris and MacDonald.

JURISDICTION AND VENUE

6. This action arises out of the requirements of § 105(f) of STAA, P.L. 97-424, and § 106(c) of STURAA, P.L. 100-17, and is brought to secure the rights of ADARAND CONSTRUCTORS, INC., as guaranteed by the due process and equal protection components of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Plaintiff seeks relief from STAA and STURAA pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction in this Court is properly invoked pursuant to 28 U.S.C. § 1331 and § 1343.

7. Venue is properly in this Court pursuant to 28 U.S.C § 1391, in that the contracts and work which give rise to this cause of action occurred in the State of Colorado.

STATEMENT OF FACTS

8. In 1982, Congress enacted STAA and, in 1987, Congress enacted STURAA. Prior to the enactment of STAA and STURAA, Plaintiff could bid for subcontracts on federally funded-highway construction projects, whether the contracts were state highway contracts funded, in whole or in part, by federal monies or federal projects.

9. Section 105(f) of STAA provides that not less than 10 per cent [sic] of all appropriated federal monies under STAA will be spent on contracts with Minority Business

Enterprises (MBE) and Disadvantaged Business Enterprises (DBE) unless the Secretary determines otherwise. Section 106(c) of STURAA provides that not less than 10 percent of all appropriated federal monies under STURAA will be spent on contracts with Disadvantaged Business Enterprises (DBE) unless the Secretary determines otherwise. The legislative history of these Acts contains no description of any findings made by Congress of discrimination in the award of federally funded highway construction contracts.

10. Regulations implementing the provisions of STAA and STURAA were promulgated, revised and adopted by the Department of Transportation ("DOT"). These regulations are codified at 49 C.F.R., part 23. The regulations provide that the ten percent (10%) requirement for MBE-DBE participation will be achieved if the recipients of the federal funds establish and award at least ten percent (10%) of all federal contract monies to certified MBE-DBE participants. 49 C.F.R. § 23.61(b).

11. The Central Federal Land Highway Division has established specific procedures and contract provisions to meet the MBE/DBE requirements of STAA and STURRA. "The Notice to Bidders and Offerors" sent to each bidder on projects offered by the Central Federal Lands Highway Division states on page 1 of 3:

> UTILIZATION OF SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS, WOMEN-OWNED BUSINESS CONCERNS, AND SMALL AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PROGRAM

Bidders should note their responsibilities in the awarding of subcontracts in accordance with the Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged individuals clause and with the Women-owned Business Concerns clause which are included in the Contract Clauses section of this contract.

The Bidder, if a big business concern, should note their responsibility to establish and conduct a Small Business and Small Disadvantaged Business Subcontracting Program in accordance with The Small Business and Small Disadvantaged Business Subcontracting Plan clause included in Contract Clause 52.219.9, Alternate I. The successful Low Bidder will be required to submit a Subcontracting Plan within 2 weeks of the opening of bids. *If the apparent successful bidder fails to submit a subcontracting plan acceptable to the contracting officer within the allowable time, that bidder may be ineligible for award of the contract.*

(emphasis added).

12. In the "Proposal and Contract" under *FEDERAL ACQUISITION REGULATION CONTRACT CLAUSES* pages F-13 through F-16, § 52.219-9, entitled SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN. (APRIL 1984) ALTERNATE 1 (APRIL 1984), the contract provides, in part, as follows:

> (c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which addresses separately subcontracting with small business concerns and small disadvantaged

business concerns, and which shall be included in and made part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. *Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.*

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns and small disadvantaged business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of –

(i) Total dollars planned to be subcontracted;

(ii) Total dollars planned to be subcontracted to small business concerns; and

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns and (ii) small disadvantaged business concerns.

(4) A description of the method used to develop the subcontracting goals in (1) above.

* * *

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) who receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

* * *

(i) *The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.*

(emphasis added)

13. "The Proposal and Contract" in the *SPECIAL CONTRACT REQUIREMENTS* section, page I-1, provides:

> The following special Contract Requirements amend and supplement the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-85. U.S. Department of Transportation, Federal Highway Administration.

Section 108, located on pages I-24 through I-26, provides, in part:

Section 108. – PROSECUTION AND PROGRESS

108.01 *Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the Subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field.

The Contractor shall also provide direct assistance to disadvantage subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.

For each subcontract, the subcontracted work, except for purchased materials, must be performed at the project site, and, except for engineering services, the labor associated with that work must be subject to the Labor Standards Provisions of the contract.

The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontract amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Payment will be made as follows:

1. Fifty percent of the computed amount (based on original subcontract amount) will be paid when the DBE subcontractor(s) commences work on the project.

2. The remainder of the computed amount (based on the final subcontract amount) will be paid when the DBE subcontractor(s) has satisfactorily completed all subcontract work.

This payment will be full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision.

Upon completion of the subcontract work, the Contractor shall furnish a certified copy of acceptable records supporting the final amount(s) paid to or on behalf of the DBE subcontractor(s).

Item 108(2) of the bid schedule provides an estimated contingent sum amount to cover the cost of this provision.

(emphasis added)

14. The use of the above described contract provisions compel the Prime Contractor bidding on federal highway projects to discriminate against certain classes of subcontractors because of their gender, race, sex or national origin. The use of the "bonus" provisions above described rewards prime contractors for their discrimination practices against certain classes of subcontractors based on their gender, race, sex or national origin.

15. Plaintiff ADARAND CONSTRUCTORS, INC. is a corporation operated primarily by Randy Pech, a caucasian male under the age of 60 years and is not qualified as a Disadvantaged Business Enterprise.

16. On or about August 10, 1989, the FHA, Central Federal Lands Highway Division, sent out a "PRE-SOLICITATION NOTICE (CONSTRUCTION CONTRACT) for Project No. CO FH 60-2(2)," with the project Title and Location as "Colorado FH 60-2(2), West Delores, Delores County." The notice provided that the offers (bids) from prime contractors were to be received by 2:00 P.M. on September 12, 1989. In the notice, number 11, "offers covering the project restricted to small business," is answered "no." Number 12 "subcontracting program required?," is marked neither "yes" nor "no."

17. The West Delores Project proposal and contract contained the standard contract provisions set forth in paragraphs numbered 11 to 13 above which compel and reward prime contractors in discriminatory practices.

18. Mountain Gravel & Construction Company of Delores, Colorado was one of the prime contractors submitting a bid to the Central Federal Highway Lands Division on the West Delores project. In response to a

request from Mountain Gravel & Construction Company for subcontracting bids Plaintiff submitted a bid for the guardrail work on the West Delores Project on September 11, 1989.

19. Shortly thereafter, Mountain Gravel & Construction Company was awarded the prime contract for the West Delores Project, including the construction of the guardrail, by the Central Federal Lands Highway Division of the FHA.

20. Since Mountain Gravel & Construction Company, as the prime contractor, is compelled and rewarded for discriminatory practices by the minority requirements of the contract and even though Plaintiff, as a guardrail subcontractor, was the low bidder for the guardrail work submitted on the West Delores Project to Mountain Gravel & Construction Company and although Plaintiff is qualified, competent, proficient and capable, the subcontract was awarded to Gonzales Construction, a Disadvantaged Business Enterprise (DBE).

21. Plaintiff believes and alleges that Mountain Gravel & Construction Company was compelled and required by the contract provisions promulgated by the Central Federal Lands Highway Division to submit a subcontracting plan that would award the subcontract to Gonzales Construction and that Mountain Gravel & Construction Company would be rewarded by a "bonus" as described above for awarding the subcontract on the guardrail to Gonzales Construction rather than to Plaintiff.

22. Plaintiff believes and alleges that such conduct by the Central Federal Lands Highway Division discriminates against Plaintiff because of gender, race, sex, and national origin contrary to the equal protection and due process clauses of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

23. As a direct result of STAA, STURAA, the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, and the regulations, as enforced by the defendants, Plaintiff has been denied the award of specialty subcontract work on account of the gender, race, sex or national origin of its operator. If STAA, STURAA, the regulations and contract provisions were declared unconstitutional, Plaintiff could bid for and receive contracts free from discrimination on account of gender, race, sex or national origin.

24. Plaintiff is injured by being denied an opportunity to meaningfully participate in the bidding for and performance of contacts for the construction of public highways funded with federal monies on account of gender, race, sex or national origin, and will continue to suffer this harm and injury as a direct result of Defendants' actions.

25. Plaintiff believes and alleges that Defendants have made no findings of discrimination in the award of federal construction contracts to justify the use of racial or gender preferences in the award of federal highway construction contracts.

26. The result of Defendants' actions is a system of rigid, inflexible quotas, which creates naked racial and

gender preferences that discriminate against Plaintiff and other innocent third parties.

COUNT ONE

27. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 26 of this Complaint.

28. Section 105 (f) of STAA and section 106 (c) of STURAA require the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts.

29. Such racial and gender preferences on their face violate the Fifth and Fourteenth Amendments to the United States Constitution and are therefore unconstitutional and must be struck down.

COUNT TWO

30. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 29 of this Complaint.

31. The actions of Defendants in the use of their regulations and contract provisions which require the use of race and gender as a factor in the award of federally financed highway construction contracts, discriminate against Plaintiff in violation of the due process and equal protection components of the Fifth Amendment to the United States Constitution and are unconstitutional and must be struck down.

COUNT THREE

32. Plaintiff realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 31 of the Complaint.

33. The actions of Defendants, in their development and administration of the DBE program, constitute government action. By requiring subcontract awards based on gender or race or granting successful prime contract bidders a bonus based on said prime contractor granting the subcontract based on gender or race, the defendants have discriminated against Plaintiff in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments and are unconstitutional and must be struck down.

COUNT FOUR

34. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 33 of the Complaint.

35. The concerted actions of Defendants deprive Plaintiff of rights, privileges and immunities secured by the United States under 42 U.S.C. § 1983.

COUNT FIVE

36. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 35 of the Complaint.

37. The use of race as a factor in the award of federally financed contracts, by excluding Plaintiff from

participation in federal funded highway construction projects on the basis of gender or race, violates the provisions of Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations are facially unconstitutional;

2. Entry of judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations, are unconstitutional as they are applied and thus deprive Plaintiff of rights secured by the Constitution and Laws of the United States;

3. Entry of judgment declaring that the Federal highway program administered by the Central Federal Lands Highway Division violates the rights of Plaintiff under the Constitution of the United States;

4. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of gender, race, sex or national origin in the administration of federal highway contracts;

5. Entry of Judgment awarding costs and attorneys fees to Plaintiff pursuant to 42 U.S.C. § 1983; and

6. For such other and further relief as to the Court seems just and equitable in the premises.

JURY DEMAND

PLAINTIFF HEREBY DEMANDS THAT THE ISSUES IN THIS CASE BE TRIED BY A CIVIL JURY.

MOUNTAIN STATES LEGAL FOUNDATION

/s/ Gary N. Herbert
William Perry Pendley
Gary N. Herbert No. 004922
Todd S. Welch
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Suite 2300
Denver, Colorado 80264
(303) 861-0244

PLAINTIFF'S ADDRESS:
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2720 East Las Vegas Street
Colorado Springs, Colorado 80906
(719) 390-4000

* * *

Section 108. – PROSECUTION AND PROGRESS

108.01 Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:

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A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.

For each subcontract, the subcontracted work, except for purchased materials, must be performed at the project site, and, except for engineering services, the labor associated with that work must be subject to the Labor Standards Provisions of the contract.

The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

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2. The remainder of the computed amount (based on the final subcontract amount) will be paid when the DBE subcontractor(s) has satisfactorily completed all subcontract work.

This payment will be full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision.

Upon completion of the subcontract work, the Contractor shall furnish a certified copy of acceptable records supporting the final amount(s) paid to or on behalf of the DBE subcontractor(s).

Item 108(2) of the bid schedule provides an estimated contingent sum amount to cover the cost of this provision.

108.04 Limitation of Operations. Add the following:

The Contractor is restricted from working in the following areas until right-of-way clearance is received by the Government:

1. Station 257+00 to Station 299+00
2. Station 555+00 to Station 570+00

Right-of-way clearance is expected by March 1, 1990.

The Contractor shall limit the hours of construction activities within 1,000 feet of occupied residences to between 6 a.m. and 10 p.m. daily.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-1413

ADARAND CONSTRUCTORS, INC.,
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII and JERRY BUDWIG, Division Engineer of The Central Federal Land Highway Division,

Defendants.

DECLARATION OF
STARLING J.T. PROFFIT

STARLING J.T. PROFFIT makes the following statement pursuant to 28 U.S.C. §1746:

1. That he makes this statement in support of the Motion For Summary Judgment filed by the Plaintiff herein.

2. That he is the Chief Estimator for MOUNTAIN GRAVEL & CONSTRUCTION COMPANY and has held that position for five (5) years.

3. That he is familiar with plaintiff ADARAND CONSTRUCTORS, INC., and has known plaintiff for approximately four (4) years.

4. That ADARAND CONSTRUCTORS, INC., has a good reputation in the highway construction industry for quality performance at reasonable prices.

5. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was the prime contractor on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

6. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY is familiar with the contract provisions and bid specifications on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration, including the Disadvantaged Business Enterprises (DBE) provisions, which pay a prime contractor a "bonus" if the prime contractor uses DBE's for at least 10% of the total contract let by Central Federal Lands Highway Division of the Federal Highway Administration.

7. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY knew that it would receive a "bonus" on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration if it subcontracted at least 10% of the contract with one or more DBEs.

8. That ADARAND CONSTRUCTORS, INC., submitted a bid to MOUNTAIN GRAVEL & CONSTRUCTION COMPANY to perform the guardrail construction work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

9. That bid submitted by ADARAND CONSTRUCTORS, INC., was the lowest bid of all bids received by MOUNTAIN GRAVEL & CONSTRUCTION COMPANY for the guardrail work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

10. That because of the contract provisions which give a bonus to prime contractors in order to encourage the use of DBEs on Federal Highway Projects, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt compelled to give the subcontract for the guardrail work to Gonzales Construction, as well as subcontract to other qualified DBE construction firms.

11. That the primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE and because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.

12. That but for the requirements of the Federal Highway contracts which encourage prime constractors [sic] to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day April, 1991.

/s/ Starling J. T. Proffit
STARLING J. T. PROFFIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-1413

ADARAND CONSTRUCTORS, INC.,
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII and JERRY BUDWIG, Divisior. Engineer of The Central Federal Land Highway Division,

Defendants.

DECLARATION OF RANDY MARK PECH

RANDY MARK PECH makes the following declaration pursuant to 28 U.S.C. §1746:

1. That he makes this declaration in support of the Motion For Summary Judgment filed by the Plaintiff herein.

2. That he is a white male and is currently General Manager of Plaintiff ADARAND CONSTRUCTOR, INC. and has held that position for 3 years. Previous to becoming General Manager he served as President since 1976.

ADARAND CONSTRUCTORS, INC. specializes in guardrail installation and is precertified by the State of Colorado to perform guardrail installation. The installation of guardrail requires specialized training, experience and equipment. ADARAND CONSTRUCTORS, INC. has the training, equipment and expertise to perform the specialty subcontract work of installing guardrail.

3. That ADARAND CONSTRUCTORS, INC. is not a DBE firm certified by the State of Colorado or any other governmental entity and is not entitled to receive the benefits conferred on DBEs by the Central Federal Lands Highway Division.

4. As General Manager he is responsible for the general, day to day operations of Plaintiff. That his duties include, overseeing all of the financial decisions of the company, developing company procedures and policies, check all of the bookkeeping work, some estimating, developing the estimating programs and tracking historical data for the estimators, and handles the bank and insurance negotiations.

5. That ADARAND CONSTRUCTORS, INC., has a good reputation in the highway construction industry for quality performance at reasonable prices.

6. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was the prime contractor on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division on the Federal Highway Administration.

7. That ADARAND CONSTRUCTORS, INC., submitted a bid to MOUNTAIN GRAVEL & CONSTRUCTION COMPANY to perform the guardrail construction work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

8. That he understands that the bid submitted by ADARAND CONSTRUCTORS, INC., was the lowest responsible bid of all bids received by MOUNTAIN GRAVEL & CONSTRUCTION COMPANY for the guardrail work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

9. That the bid submitted by ADARAND CONSTRUCTORS, INC. on the West Delores project for guardrail and related items was $104,800.

10. That as a result of not receiving the bid on the West Delores project ADARAND CONSTRUCTORS, INC. was unable to realize a profit of approximately $20,000.

11. That he contacted the state highway departments for the States of Colorado, Nevada, Utah, Wyoming, New Mexico, Arizona and Idaho and obtained the publications of those States that set forth the number of Certified DBE contractors in each of those States and the number of prequalified Non-DBE contractors. That he personally counted the number of DBEs and prequalified Non-DBEs in each state. That the number of DBEs and prequalified Non-DBEs in each States is as follows:

	DBE Contractors	Prequalified Non-DBE Contractors
Colorado	211	145
Nevada	140	231
Utah	65	166
Wyoming	54	308
New Mexico	193	
Arizona	160	270
Idaho	91	

The States designated with an * did not provide information on Non-DBE contractors.

12. That at various times ADARAND CONSTRUCTORS, INC. has been a prime contractor on jobs in Colorado.

13. That he views the DBE provisions of the contract – which pay a "bonus" for use of DBEs on highway construction and require large business concerns to prepare a subcontracting plan showing the proposed use of DBEs – as a requirement that they must meet or they may lose the contract. Rather than take the chance that they will lose the bid once they have obtained it, they will use the DBEs even if a lower bid is received from a Non-DBE.

14. That because a prime contractor is required to perform 50% or more of the contracted work, a large percentage of the subcontracted work is in the specialty area, including guardrail, which puts an undue burden on non-DBE companies that work only in the specialty areas.

15. That he has read the Contract which is the subject matter of this action and is attached to the Motion for

Summary Judgment as Exhibit A and he has not found a specific provision of the Contract which provides that a prime contractor does not have to participate in the Subcontracting Compensation Clause program.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 18th day of April, 1991.

/s/ Randy M Pech
RANDY MARK PECH